The Honorable Susan K. Serko
Hearing Date: August 2, 2019
Hearing Time: 9:00 a.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

MICHEAL W. GARWICK and MATTHEW A. GRANSTROM, individually and on behalf of all those similarly situated,

Plaintiffs,

v.

VETERANS INDEPENDENT ENTERPRISES OF WASHINGTON, a Washington public benefit corporation, DONALD HUTT, an individual, and GARY PETERSON, an individual,

Defendants.

No. 18-2-09076-3

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

I. RELIEF REQUESTED

Plaintiffs seeks an order finding that late payment of wages is willful withholding and that Class 1 Plaintiffs are owed exemplary damages under the Washington Wage Rebate Act ("WRA"), RCW 49.52, for wages paid late as well as prejudgment interest from the time the wages were due until the time they were paid. Plaintiffs also seek an order finding that the time Class 1A employees were permitted by Defendants to work without pay performing commercial activities is compensable under the Washington Minimum Wage Act ("MWA"), RCW 49.46 and awarding back wages, exemplary damages and prejudgment interest. In addition, Plaintiffs seek an order finding that the deductions taken from Class 2 members wages financially benefitted Defendants and were therefore

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unlawful under WRA and/or MWA and awarding back wages in the amounts unlawfully deducted plus exemplary damages and prejudgment interest. Lastly, Plaintiffs seek an order that Donald Hutt and Gary Peterson are employers under MWA and WPA and for that reason and other reasons are personally, jointly and severally liable for all damages awarded.

II. STATEMENT OF FACTS

A. Class Members and Stated Mission and Vision of Defendant Veterans Independent Enterprises of Washington.

The stated mission of Defendant Veterans Independent Enterprises of Washington ("VIEW") is to "Provide work opportunities, housing and supportive services to Veterans with disabilities, in transition from homelessness, incarceration and/or economically disadvantages situations". VIEW's vision is "Ensure transitioning and/or displaced Veterans receive support in their efforts to become self-sufficient." See *Pizl Decl. ¶1, Ex. A.* The class representatives Michael Garwick and Matthew Granstrom, as well as a majority of the certified class members in this case came to VIEW as vulnerable individuals in need of work opportunities, housing and support services.

B. Members of Certified Class 1 were paid late on several occasions starting February 20, 2018 and continuing through May 10, 2019.

The payroll cycle at VIEW is long-established. Wages for work performed from the first of the month to the fifteenth of the month are paid no later than the twentieth of that month. Wages for work performed from the sixteenth through the end of the month are paid no later than the fifth of the following month. If the fifth or the twentieth fall on a holiday or weekend, the payroll date is moved to the business date prior to the scheduled payroll date. See *Pizl Decl. ¶2, Ex. B.* Defendants have admitted to paying employees late due to financial difficulties. *See Pizl Decl. ¶3, Ex. C.* The business records, such as bank statements and cancelled checks, indicate that Class 1 members were paid after the long-established pay dates. See *Pizl Decl. ¶4, Ex. D.*

C. Certified Class 1A members were permitted or by Defendants to work without pay performing tasks related to commercial operations.

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It is undisputed that Defendants, immediately following laying them off, permitted Class 1A members to volunteer and that they worked without pay performing tasks normally performed by paid employees in its commercial operation. Regardless of what was verbally articulated by VIEW's management and board, volunteering wasn't truly optional. A reasonable inference is that in order for them to go back on payroll when VIEW regained its financial stability, they needed to volunteer. Also, for many of them, VIEW also controlled their housing and it can be inferred that they needed to volunteer or be homeless. It is undisputed as to the hours worked as the business records, volunteer logs, detail the dates and times worked by each class member. See *Pizl Decl. ¶5, Ex. E.*

D. For their financial benefit, Defendants deducted amounts for rent, program fees and housing fees from the wages of Class 2 members.

Class 2 members are individuals that came to VIEW as part of its primary mission and program. Many were homeless, transitioning from incarceration, suffering from drug and alcohol addictions and were very much in need of work opportunities, housing and support services that VIEW advertised. It is undisputed that when Class 2 members were place into VIEW's program, hired and placed in housing, VIEW presented them with forms authorizing deductions from each of their wage checks for program fees, housing fees and rent and that Class 2 members signed them. It is clear that the money deducted financially benefitted Defendants as the forms indicate that the deductions are for "operating expenses". See *Pizl Decl. ¶6, Ex. F.*

III. EVIDENCE RELIED ON

This Motion relies on the Declaration of James B. Pizl, the exhibits thereto and the records and pleadings on file in this matter.

IV. STATEMENT OF ISSUES

1. Should this Court find that on multiple occasions, Defendants failed to pay members of Class 1 on the long-established, regularly scheduled pay dates and if so, should the Court find that under the WRA, late payment of wages constitutes willful withholding and award

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exemplary damages and reasonable attorney's fees and costs to Class 1 members for all incidents of late payment of wages?

2. Should this Court find that deductions taken from the wages of Class 2 members financially benefitted defendants and if so, should the court find that those deductions were unlawful under WRA and award back wages in the amount of the unlawful deductions, exemplary damages, prejudgment interest and reasonable attorney's fees?

3. Should this court find that when Class 1A members were permitted to work following layoffs, the hours were compensable under MWA and award back wages, exemplary damages, prejudgment interest and reasonable attorney's fees.

4. Should the Court find that all Gary Peterson and Donald Hutt are employers pursuant to MWA and WRA and for that reason and other reasons are jointly and severally liable for all wages, exemplary damages, prejudgment interest and attorney's fees and costs awarded.

V. ARGUMENT

A. Summary judgment standard.

This Court should grant summary judgment when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). Summary judgment is designed to do away with unnecessary trials when there is no genuine issue of material fact. *LaPlante v. State*, 85 Wn.2d 154,158, 531 P.2d 299 (1975). "A material fact is one upon which the outcome of the litigation depends." *Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977); *Tran v. State Farm Fire and Cas. Co.*, 136 Wn.2d 214, 223, 961 P.2d 358 (1998). The Court may decide questions of fact as a matter of law when reasonable minds could reach but one conclusion. *Ruff v. County of King*, 125 Wn.2d 697, 703-704, 887 P.2d 886 (1995).

When opposing a summary judgment motion, the non-moving party may not rely on bare allegations in the pleadings, but must set forth specific facts showing a genuine issue of material fact exists for trial. *Baldwin v. Sisters Providence in Wash., Inc.*, 112 Wn.2d 127, 132, 769 P.2d

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298 (1989). The non-moving party cannot create genuine issues of material fact by "[m]ere allegations, argumentative assertions, conclusory statements, and speculation." *Greenhalgh v. Department of Corrections*, 160 Wn. App. 706, 714, 248 P.3d 150 (2011). Nor can the non-moving party create an issue of material fact by filing an affidavit that contradicts the party's prior sworn statements without explanation. *Safeco Ins. Co. v. McGrath*, 63 Wn.App, 170, 174-175, 817 P.2d 861 (1991). A non-moving party's self-serving statements of conclusions and opinions are insufficient to defeat a summary judgment motion. *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 359-361 (1988). If the non-moving party fails to show the existence of an element essential to his or her case and on which the plaintiff will bear the burden of proof at trial, then the moving party is entitled to judgment as a matter of law. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

B. The Washington Minimum Wage Act and Wage Rebate Act are Remedial Statutes and Must Be Liberally Construed in Favor of Employees.

Washington State has a "long and proud history of being a pioneer in the protection of employee rights." *Drinkwitz v. Alliant Techsys., Inc.,* 140 Wn.2d 291, 300, 996 P.2d 582 (2000). Remedial statutes protecting employee rights must be liberally construed. *Internat'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 35, 42 P.3d 1265 (2002). A liberal construction requires that the coverage of the statute's provisions "be liberally construed [in favor of the employee] and that its exceptions be narrowly confined." *Peninsula Sch. Dist. No. 401 v. Pub. Sch. Employees*, 130 Wn.2d 401, 924 P.2d 13 (1996).

C. Late payment of wages gives rise to a cause of action under WRA if willful. Defendants actions in paying employees late was willful and therefore, Class 1 members are entitled to recover exemplary damages and prejudgment interest.

An employer shall pay all wages owed to an employee on an established regular pay day at no longer than monthly payment intervals. *WAC 296-128-035.* "'Delayed' payment of wages beyond the time frame set forth in WAC 196-128-035 does give rise to employer liability under WRA but only where such delay is 'willful'…" *Champagne v. Thurston County*, 163 Wash.2d

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69,90, 178 P.3d 936 (2008) (Finding that delayed payment did not give rise to exemplary damages only because it was not willful).

A willful withholding is "the result of knowing and intentional action and not the result of a bona fide dispute." *Wingert v. Yellow Freight Sys., Inc.*,146 Wn .2d 841, 849, 50 P.3d 256 (2002). A bona fide dispute is a fairly debatable disagreement over whether an employment relationship exists or whether all or a portion of the wages must be paid. *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 161, 961 P.2d 371 (1998). Failure to pay wages due to financial inability to do so constitutes willful withholding with the meaning of RCW 49.52.070. *Id.*

Determining willfulness is a question of fact reviewed for substantial evidence. *Pope v. University of Washington*, 121 Wn.2d 479, 490, 852 P.2d 1055 (1993). "However, where no dispute exists as to the material facts, the court may dispose of such questions on review of summary judgment." *Champagne*, 163 Wn.2d at 81–82, 178 P.3d 936. Here, not only did the Defendants admit the late payment in answers to interrogatories, the Defendants' business records clearly establish that employees were paid late. See *Pizl Decl. ¶¶3-4, Ex. C-D.* The Defendants' only justification for paying employees late was financial difficulty or inability to pay on time due to cash flow issues, which is not a valid defense against exemplary (double) damages under WRA. *Shilling*, 136 Wn.2d 152 at 166.

Business records indicate that the paychecks due on February 20, 2018 ($13,866.57); March 5, 2018 ($8,746.68); May 18, 2018 ($10,826.42); August 20, 2018 ($13,915.78); September 5, 2018 ($15,905.49); October 5, 2018 ($14,239.97); January 4, 2019 ($16,554.16); January 18, 2019 ($15,548.64); March 5, 2019 ($16,345.15) and April 19, 2019 ($22,385.45) were paid late. See *Pizl Decl. ¶4, Ex. D.* Class 1 Plaintiffs are therefore entitled to exemplary damages totaling $148,334.31. Prejudgment interest is also applicable from the time between the date each payroll was due until it was paid totaling $681.31. See *Pizl Decl. ¶4, Ex. D.*

D. Work performed by Class 1A members was subject to the MWA and this court should award back wages at the applicable minimum wage for all hours worked.

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Unless an exemption applies, employers must pay wages to employees who they suffer or permit to work. RCW 49.46.120. Exemptions under the MWA are narrowly construed. *Drinkwitz*, 140 Wn.2D 291, 301, 996 P.2d 582 (2000). The employer bears the burden of showing that exemption applies. *Id.* at 304.

Here, Defendants may try to claim an exemption under RCW 49.46.010 (3)(d), "...engaged in the activities of [] a nonprofit organization where the employer-employee relationship does not in fact exist or the services are rendered [] gratuitously.[]" However, it is disingenuous to claim the employer-employee relationship does not exist when it existed both before the layoffs and for almost all of the individuals that volunteered, it existed afterward when VIEW was able to pay employees again. Also, there is a question about whether the services were actually rendered gratuitously. Many of these individuals depended on VIEW for their housing. It is impossible that Class 1A members volunteered in a truly gratuitous manner, since, for most of them, their housing was in jeopardy if they didn't.

It is also helpful to look at Federal guidance as it relates to volunteering, specifically U.S. Department of Labor, Wage and Hour Division Fact Sheet #14A. *Pizl Decl. ¶7, Ex. G.* Although the Fair Labor Standards Act ("FLSA") and the Washington Minimum Wage Act ("MWA") are not identical, Washington courts look to the FLSA for guidance in interpreting the MWA where the provisions of the two acts are similar. *Drinkwitz,*140 Wn.2d at 300; *Mitchel v. PEMCO Mutual Insurance Co.*, 134 Wn.App. 723, 730, 142 P.3d 623 (2006).

The spirit of the exemption from the minimum wage, either MWA or FLSA, is that the activities must be for the organizations' charitable purpose. "Individuals may [freely] volunteer time to religious, charitable, civic, humanitarian, or similar non-profit organizations as a public service and not be covered by the FLSA [or MWA]. Individuals generally may not, however, volunteer in commercial activities run by a non-profit organization such as a gift shop."[1] *Emphasis*

[1] U.S. Department of Labor Wage and Hour Division Fact Sheet #14A

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added. While VIEW doesn't have a gift shop, it does have a commercial production line where it refurbishes respirators, works with adhesives and performs other activities for Boeing and other customers. During the time in question, Class 1A members worked on the commercial production line, not for any charitable, civic, humanitarian or similar purpose.

Taking the reality of the situation and the reasonable inference that most of the Class 1A members either anticipated that they would have their paid jobs back when VIEW became solvent or they feared for their housing, it is clear the work was not done freely and voluntarily. In addition, considering the work that was performed was for VIEW's commercial production lines and not for its charitable purpose, coupled with exemptions to MWA needing to be narrowly construed as well as the Defendants' inability to meet their burden of proving the exemption, the court must conclude that the work performed was subject to MWA and award back wages and prejudgment interest. The failure to pay wages was clearly willful (discussed previously) since there is no fair debate or bona fide dispute about whether wages were due. Consequently, exemplary (double) damages are also applicable.

Defendants kept "volunteer logs" to detail all the hours worked. See *Pizl Decl. ¶5, Ex. E.* Per the logs, from February 28, 2018 through March 28, 2018, Class 1A members worked a total of 913.59 hours. Applying the applicable minimum wage during that time of $11.50 per hour to each shift worked yields a total of $10,506.67. Prejudgment interest at 12% to date based on the scheduled payroll date totals $1,277. 08.

E. The deductions for rent, program fees or housing fees from Class 2 members' wages were unlawful and the court should award back wages and exemplary damages for all amounts deducted.

1. The deductions for rent, program fees or housing fees do not meet the test for lawfulness under RCW 49.52.060.

An employer may withhold any portion of an employee's wages "[] when a deduction has been expressly authorized in writing in advance by the employee for a lawful purpose accruing to the benefit of such employee [] PROVIDED, That the employer derives no financial benefit from

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such deduction []."[2] *Emphasis added.* It is undisputed that Class 2 members signed authorizations for amounts to be deducted from their wages for program fees, housing fees or rent upon onboarding as employee/tenants. See *Pizl Decl. ¶6, Ex. F.* On the surface, the first two prongs of the test are met: in writing and in advance. Setting aside the possibility, even the high likelihood that the signatures were compulsory to be part of the program, obtained by undue influence or duress, or were involuntary for other reasons, the criteria for lawfulness is still not met. VIEW financially benefitted from the deduction as the money remained in its checking account and were used to pay its operating expenses as indicated by the payroll deduction authorization forms. Since VIEW financially benefitted from the deductions, the deductions are unlawful.

2. Looking at the reality of the relationship between Class 2 Members and VIEW yields the same result.

It is disingenuous at best for VIEW to characterize its connection with Class 2 Members as two separate and distinct relationships, employer/employee and landlord/tenant. Based on VIEW's stated mission and vision, the two are in inextricably linked. As stated in its mission, these individuals were and are "in transition from homelessness, incarceration and/or economically disadvantaged situations." In reality, if they were not provided with housing, they would not be able to work at VIEW and vice versa.

When this reality is considered, Defendants are clearly in violation of MWA because in substance, they are improperly considering the rent and program fees as wages. "'Wage' means compensation due to an employee by reason of employment, payable in legal tender of the United States or checks on banks convertible into cash on demand at full face value []" *RCW 49.46.010 (7).* Consequently, housing or programs provided cannot be considered wages for purposes of determining whether Defendants have met their obligation of paying Class 2 members at or above the applicable minimum wage. In substance, Class 2 members were paid lower than the minimum wage because the minimum wage threshold must be met in cash, not in housing or programs.

[2] RCW 49.52.060. See also WAC 296-126-028 (3).

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3. Class 2 Members are entitled to back wages and exemplary damages

Whether the court considers the amounts deducted to be unlawful deductions under RCW 49.52.060 or as a failure to pay wages at or above the minimum wage in violation of RCW 49.46.020, Class 2 members are entitled to back wages in the amounts taken as deductions.

Exemplary damages are applicable when the violation is willful. *RCW 49.52.070.* There is no fair debate on whether the deductions were unlawful. As discussed previously, when there is no fair debate on whether wages are due, the violations are willful. Therefore, Class 2 members are also entitled to exemplary damages.

Defendants business records clearly show the amounts deducted. For the period November 2, 2015 though May 10, 2018, the total amount deducted for program fees, housing fees and rent was $132,604.70. Calculating prejudgment interest at 12% to current date based on payroll due dates yields a total of $37.748.69. *Pizl Decl. ¶8, Ex. H.*

F. The Classes are entitled to recover reasonable attorney's fees and costs.

Because Class 1A and Class 2 are recovering back wages in this matter, those Plaintiffs are entitled to recover their reasonable attorney's fees and costs. See RCW 49.46.090, RCW 49.48.030 and RCW 49.52.070. For Class 1, because the court is finding that the late payment of wages was willful, the same statute that provides for exemplary damages, RCW 49.52.070 also requires the payment of attorney's fees and costs. The Plaintiffs' attorney's fees of $79,859.00 and costs of $6,179.20 are reasonable. See *Pizl Decl.¶¶9-16, Ex. I.* Plaintiffs anticipate approximately $1,500 of additional attorney's fees to draft a reply to the Defendants' response to this motion and to prepare for and argue this motion to the court.

G. Gary Peterson and Donald Hutt are Employers for the purposes of MWA and WRA and are personally liable for claims asserted in this case.

Gary Peterson and Donald Hutt are and were board members and delegated management authority, including matters related to employees of VIEW, to officers and subordinates. For part of the class period Mr. Hutt held the position President and CEO and at other times during

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the class period Mr. Peterson held the position of President and CEO. The President and CDO routinely acted in the interest of VIEW in relation to its employees. However, for the entire class period, as board members delegating management authority, both acted *indirectly* in the interest of VIEW in relation to its employees. Consequently, both fall under the definition of "Employer" under RCW 49.46.010 (4) and consequently, are personally liable for the wage claims asserted in this case.

For the claims deemed to be willful withholding, as all of these claims are, both Mr. Peterson and Mr. Hutt are personally liable for exemplary damages and attorney's fees and costs. Not only do they meet the definition of employer, but they were and are also officers or agents of VIEW. See RCW 49.52.070, RCW 49.52.050 (1-2). See also *Morgan v. Kingen*, 166 Wn.2d 526, 210 P.3d 995 (2009)(Officers are personally liable for wages, exemplary damages and attorneys' fees even when bankruptcy trustee froze company assets and would not permit payment of wages with the frozen assets); *Allen v. Dameron*, 187 Wn.2d 692, 389 P.3d 487 (2017) (Board members, officers, vice-principals or agents are personally liable even when the company is legally prohibited from paying employees due to Chapter 7 bankruptcy filing).

VI. DAMAGES SUMMARY

Total damages consist of back wages in the amount of $143,111.37 ($10,506.67 for Class 1A and $132,604.70 for Class 2) and exemplary damages of $291,445.68 ($148,334.31 for Class 1, $10,506.67 for Class 1A, and $132,604.70 for Class 2) which totals to $434,557.05. Prejudgment interest totals to $39.707.08 ($681.30 for Class 1, $1,277.08 for Class 1A, and $37,748.69 for Class 2). Attorney's fees and costs through oral argument for this motion total an estimated $87,538.20.

VII. CONCLUSION

There are no genuine issues of material fact related to the Plaintiffs' claims in this case and the court should grant partial summary judgment against all Defendants, jointly and severally, in favor of all Plaintiffs in all Certified Classes on all claims.

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1. The Court should find that on several occasions, Defendants failed to pay members of Class 1 on the long-established, regularly scheduled pay dates and those late payments of wages constitute willful withholding in violation of WRA and award exemplary damages, prejudgment interest and reasonable attorney's fees and costs to Class 1 members for all incidents of late payment of wages.

2. The Court should find that deductions taken from the wages of Class 2 members financially benefitted Defendants and therefore, were unlawful under RCW 49.52.060 and award back wages in the amount of the unlawful deductions, exemplary damages, prejudgment interest and reasonable attorney's fees and costs.

3. The Court should find that when Class 1A members were permitted to work following layoffs and that the hours were compensable under MWA and award back wages, exemplary damages, prejudgment interest and reasonable attorney's fees and costs.

4. The Court should find that Gary Peterson and Donald Hutt are employers pursuant to MWA and WRA and are therefore or otherwise jointly and severally liable for all wages, exemplary damages, prejudgment interest and attorney's fees and costs awarded.

5. The Court should enter judgement in favor of Plaintiffs against all Defendants, jointly and severally, in the amount of $561,802.33 consisting of judgment principal of $434,557.05, interest of $39,707.08 and attorney's fees and costs of $87,538.20.

DATED This the 3rd day of July, 2019

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CERTIFICATE OF SERVICE

I certify that I caused to be served in the manner noted below a copy of the foregoing Plaintiff's Motion for Partial Summary Judgment on the following individual(s):

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DATED: July 3, 2019, at Puyallup, Washington.

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